

# At Work Or At Home Your Words Can Get You Fired



Two interesting incidents should remind employees how their legal behaviour and words can get them fired.

In one court decision in BC, (*Overwaitea Food Group v United Food and Commercial Workers Union, Local 1518*), an employee was fired after two other employees complained about his negative, derogatory and rude comments, while not directed at them, were grounds for his termination. In this instance the employee made disparaging comments about his ex-wife, whom the employees did not know, and stated aggressive views on political and other topics, in the presence of other employees. The courts upheld the organization's decision to terminate agreeing that his comments were rude and aggressive. In his case it was important to note that this employee had previously been warned that this ongoing aggressive verbal conduct and discussions of his personal life could lead to his termination.

In a recent highly publicized case an employee of Hydro One in Ontario was fired after he publically harassed a reporter on-air during the 2015 FIFA cup. In this instance the employee was clearly not at work and was not speaking negatively about his employer, co-workers or customers but was behaving rudely to the reporter and disparaging her in public. In this case the employee was terminated as a result of his public conduct. Whether Hydro One felt that his conduct itself reflected badly on them or more so not firing this employee would reflect badly on them is not clear, but the result was his off-duty conduct resulted in his termination without any prior warnings for these behaviours.

## **The Social Media Sharing Effect**

One standing litmus test for terminating an employee based on his/her off-duty comments and conduct was whether or not the comment/conduct undermined the person's ability to continue to work with colleagues or customers and whether the comments constituted a serious and intentional attempt to harm the reputation of the organization. We have seen several incidents over the past few years where private social media posts that included negative comments about co-workers or an organization's clients lead to discipline and dismissals that were upheld by courts.

Until recently Canadian employees generally had the right to voice their opinions or take actions during their personal time that, if not illegal, might be rude, unpleasant and unpopular and it would be rare and difficult for their employer to use

these personal incidents to discipline or terminate an employee. In some cases if the employee was in a senior leadership role public acts of misbehaviour might be noticed and cause harm to the organization but generally the misguided but not illegal private acts of an employee would not lead to a termination the very first time they occurred.

Today with the proliferation of technology that can capture, record, display and preserve our words and actions and then rapidly share them via the Internet what once may have been private or had a limited impact can now spread far and fast. The fact that there is so much Internet traffic that most negative actions will have only a fleeting presence and is soon forgotten does not seem to matter as much as the fact that it does exist and can be shared again and again.

### **What off-duty misconduct can lead to termination?**

Conduct that:

- Harms the company's reputation or product (or might harm)
- Renders the employee unable to perform his duties satisfactorily
- Causes other employees to refuse or hesitate to work with the offending employee
- Contravenes the *Criminal Code*, or *Human Rights Code*
- Seriously undermines the employer's ability to efficiently manage its operations and workforce.

### **Organizational Brand Protection**

Trademark and copyright brand protections are nothing new but now it appears an employee can harm the 'brand' of an organization by doing or saying the wrong thing online, in public, at the park or just about anywhere.

If your organization wants to police and use off-duty words and actions as a tool for disciplining and terminating employees there are two things you should put in place to help ensure your discipline and termination will stick:

1. **Off-duty Behavior Policy:** Create a clear policy that indicates that off-duty conduct that could potentially or does harm the reputation of the organization is against company policy and can lead to discipline and termination.
2. **Morality Clause:** Perhaps it sounds like something from another time but as a factor of employment your organization could include a 'morality' clause in any employment agreements or contracts. This morality clause could state clearly that employees agree that their off-duty behaviors should conform to a code of conduct that includes certain behavioral expectations that safeguard the organizations reputation. You can indicate that these include refraining from illegal activity but also any conduct that could embarrass or undermine the reputation of the organization in the minds of the public. To make this stick you would need to strike a balance between your expectations and an employee's rights and not ban the employee from conduct that the general community might find appropriate or that is a protected right.

In 2014 in Ontario in *The City of Toronto v Toronto Professional Fire Fighters' Association, Local 3888* (Nov. 2014), the courts indicated that a reasonable test for determining if off-duty misconduct warrants dismissal is if "*a reasonable and fair-minded member of the public, if apprised of all the facts, would consider that the [employee's] continued employment would so damage the reputation of the employer as to render that employment untenable.*"

With regards to the Hydro one decision to terminate their FIFA behaving badly

*employee, whether most of the public felt that insulting a reporter at the FIFA cup damaged the reputation of Hydro One is not clear. What is clear is that because Hydro One did have an off-duty code of conduct they were able to use this code to terminate their employee.*